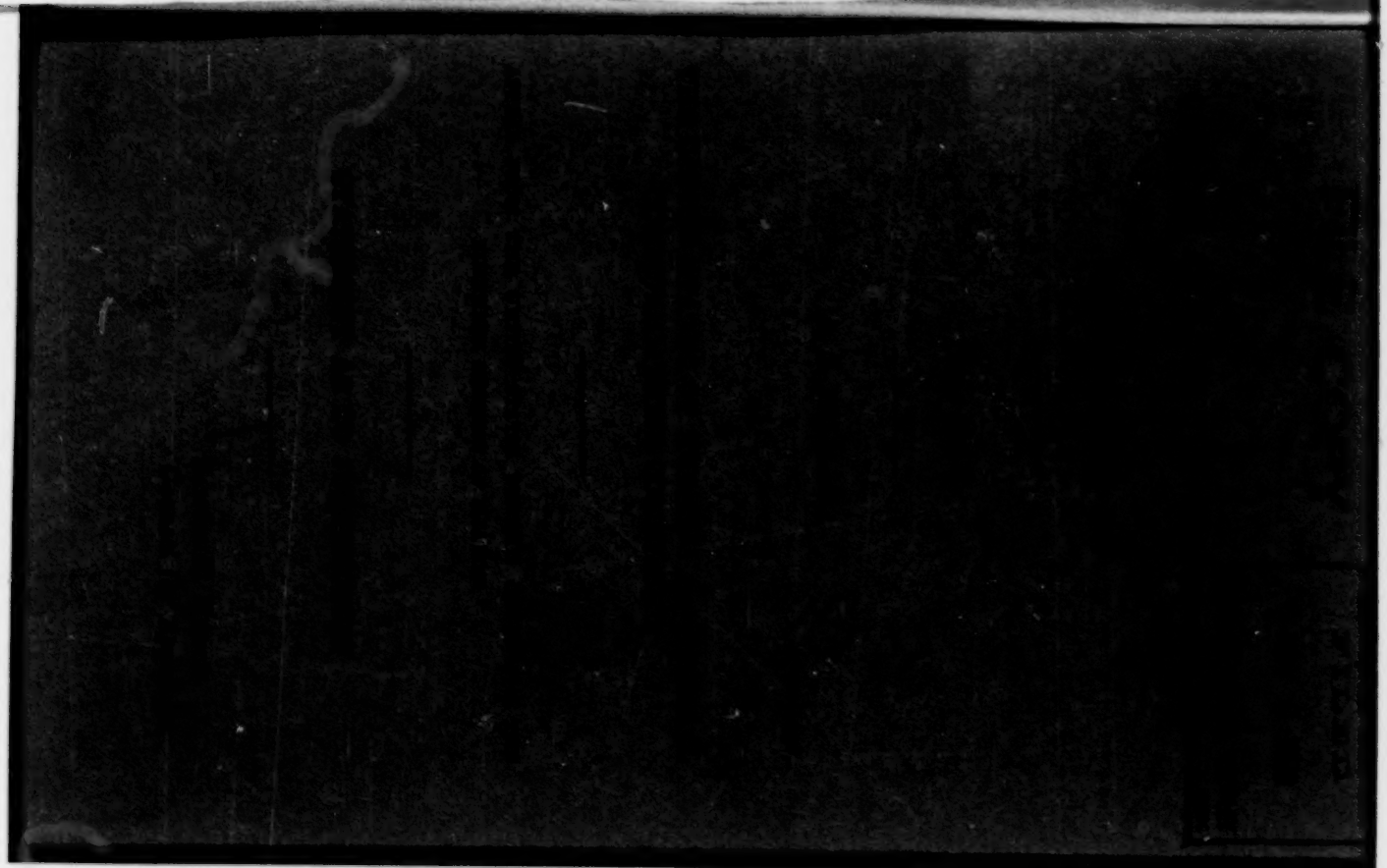

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 227

A. J. FELMAN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant,

FEDERAL COMMUNICATIONS COMMISSION,
Intervenor

JURISDICTIONAL STATEMENT

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, adopted February 13, 1939, as amended March 25, 1940, October 21, 1940, May 26, 1941, and April 6, 1942, the plaintiff-appellant submits herewith his statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in this cause.

(a) The statutory jurisdiction of the Supreme Court to review by direct appeal the final judgment and decree here complained of is conferred by Section 1253 of Title 28, United States Code.

(b) Under the statute of the United States (Section 303(f), (j) and (r) of the Communications Act of 1934, 48 Stat. 1082, as amended by 52 Stat. 190, 191), granting authority to the Federal Communications Commission to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter", Rule 3.109 was promulgated. Plaintiff-appellant complains of said rule in its application as to him, as being unreasonable, arbitrary and not contemplated or authorized by the statute; and contends that, if contemplated by the statute, then the statute, in its application to plaintiff-appellant, is unconstitutional and void.

This suit was brought under Section 402(a) of the Communications Act of 1934, 48 Stat. 1093, as amended by 50 Stat. 197 and 63 Stat. 108, the procedure being governed by Title 28, United States Code, Section 1336. Inasmuch as the complaint prayed an injunction restraining the enforcement, operation or order of the Federal Communications Commission, the case was required to be tried by a three-judge court pursuant to Title 28, United States Code, Section 2325.

The complaint was against the United States of America as defendant. The Federal Communications Commission intervened. The defendant and the intervenor joined in a motion to dismiss or, in the alternative, for summary judgment. The case was heard by the three-judge court upon the complaint and such motion, and upon briefs and oral arguments. The Court denied the motion to dismiss but granted the motion for summary judgment. The Court made Findings of Fact and Conclusions of Law, but delivered no opinion.

The following decisions are believed to sustain the jurisdiction both of the Supreme Court and of the District Court: *Columbia Broadcasting System, Inc.* v. *United States,* 316

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U. S. 407 (1941); *National Broadcasting Co.* v. *United States*, 316 U. S. 447 (1941).

The complaint (which upon motion to dismiss or for summary judgment must be taken as true) alleged in substance as follows:

Plaintiff alleged that in 1932 he sold all of the capital stock of a corporation owning and operating Radio Station WCLS in Joliet, Illinois, to one Hoffman. On August 9, 1937, a new contract was substituted for the 1932 contract, and provided for a small amount of cash and a reservation of ¾ of an hour a day as long as the station broadcasts, free of charge, for the advertising of plaintiff's products, the products of the Boston Store (a department store plaintiff operates), and for any of the products for sale in the Boston Store. No interest in the property of the station, in the license, no control of the management, no reverter and no right to insist upon the use of programs or interference with the right of censorship in the station, was provided or ever asserted or claimed.

Section 151, Sub-section (i) of Section 154, and Subsection (r) of Section 303, of the Communications Act of 1934 (June 19, 1934, Chapter 652, Sections 1, 4 and 303, 48 Stat. 1034, 1066, 1082 as amended May 20, 1937, Chapter 229, Sections 1, 3, 4, 5, 6a, 6b, 50 Stat. 189, 190, 191) provide in part as follows:

> 151: "For the purpose of regulating interstate and foreign commerce in communication by wire and radio, so as to make available * * * a *rapid, efficient* * * * wire and radio communication *service with adequate facilities* * * * there is hereby created * * * the Federal Communications Commission * * *."
>
> 154(i): "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter, as may be necessary* in the execution of its function."

303(r): "Make such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law, as may be necessary* to carry out the provisions of this chapter. (Emphasis supplied.)

Prior to the promulgation of Rule 3.109 by the Federal Communications Commission, the owner of the Station WJOL (formerly WCLS) made application for renewal of its license. Temporary extensions have been granted, pending compliance, by such owner and plaintiff, with said rule. In that connection the Commission demands that the contract of August 9, 1937, be amended so that it will not run beyond February 16, 1964, and so that it will be terminable at the option of the licensee, at an agreed figure not to be so unduly large as to prevent the exercise of the option in practice, and to be approved by the Commission. Plaintiff contends that the promulgation of the rule to apply in any and all cases, *and particularly under the facts of plaintiff's situation,* is not authorized by the statute and does not follow the decision of the Circuit Court of Appeals for the District of Columbia in *Churchill Tabernacle* v. *Federal Communications Commission,* 160 F. 2d 244, where the Court distinctly announced that no existing contracts should be unreasonably disturbed unless the public interest demands it.

Plaintiff alleges that the application of the rule as to his situation does not in any manner promote the public interest, which plaintiff claims is not involved, and that the Commission had no power to make a rule applicable to any and all cases and which did not follow the rule announced by the Court of Appeals.

Plaintiff therefore states that the action of the Commission in attempting to apply the rule to plaintiff is unreasonable, arbitrary and will deprive plaintiff of his property in violation of the Fifth Amendment to the United States Constitution, and plaintiff in his complaint sought an injunction against the enforcement of the rule.

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Appellant is informed that there are a considerable number of reserved time cases to which Rule 3.109 will apply, if held valid as a rule of general application.

The important question involved in this case is whether the Commission, under the statute above quoted, may promulgate a rule (3.109) *to apply to any and all cases* when under the admitted facts of the plaintiff's case the contract and operation of the contract does in no way affect the public interest.

As stated above, the contract did not involve the reservation of any interest in the license or in the station's property, did not vest any control in the plaintiff and the operation of the station, or management thereof. The station had full right to reject any and all programs offered by the plaintiff and the contract gave the station full and complete right to substitute other programs in the public interest. The contract merely gave the plaintiff the right, free of charge, to broadcast for ¾ of an hour a day programs advertising plaintiff's Boston Store and all products offered for sale therein. Plaintiff charged parties whose merchandise was advertised and sold in the Boston Store an amount less than the station's rate.

The Court of Appeals in *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d, 244 (where there was an express reservation of interest in the property and in the license, and where the number of hours a day of reserved time for the Tabernacle was unreasonably long) held that the public interest was not served by such a contract but that the station and the owner of the contract should be given every reasonable opportunity to amend the contract so that it would not affect the public interest, *and that the owner of the reserved time be not unreasonably deprived of his property under the contract.*

Instead of following the rule announced by the Court of Appeals, the Commission adopted a general rule setting forth conditions *that must be met in all cases of reserved time contracts* instead of ruling on each contract by itself, and independent of whether in the particular case the execution of the contract affected the public interest. Plaintiff contends that the language, construction, and operation of its contract in no way affects public interest; that the only difference between it and any other renter of time is that instead of paying the station for the time rented and the station applying the payment on the purchase price, the time is free; that under such conditions the application of the rule to plaintiff deprives plaintiff of his purchase price for the station arbitrarily, unreasonably and without any requirement of the public interest; and that such action is not authorized by the statute or contemplated by it; and that if contemplated by the statute, is arbitrary and unreasonable and in violation of the Fifth Amendment to the Constitution. As above stated, appellant is informed that a considerable number of reserved time cases will be affected if Rule 3.109 is held to be valid as a rule of general application. It is important for the plaintiff and all others similarly situated to know whether the Commission can by general rule, and not by the merits of each case, invade the property rights of plaintiff and similarly situated persons, where the public good in no way demands it or is affected by it.

We believe, also that this issue has not been decided by the Supreme Court and should be passed upon in the interest of the plaintiff and of all others similarly situated and in the interest of the Commission itself.

Respectfully submitted,

SAMUEL E. HIRSCH,
Counsel for Appellant.

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